

August 5, 2024

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil Docket No. 3:16-md-2738-FLW-LHG

IN RE:

JOHNSON & JOHNSON TALCUM
POWDER PRODUCTS MARKETING,
SALES PRACTICES AND PRODUCTS
LIABILITY LITIGATION

MOTION TO COMPEL
DEPOSITION TESTIMONY
OF PAUL HESS

* * * *
MONDAY, AUGUST 5, 2024

* * * *

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Transcript of proceedings in the

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above matter taken stenographically by

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Theresa Mastroianni Kugler, Certified Court Reporter,

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license number 30X100085700, Notary Public of the

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State of New Jersey and the Commonwealth of

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Pennsylvania, VIA ZOOM REMOTE VIDEOCONFERENCE,

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commencing at 3:01 PM.

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1 SPECIAL MASTER SCHNEIDER: This is
2 Special Master Judge Schneider. We're here for oral
3 argument on the motion to compel deposition testimony
4 of Paul Hess and for sanctions. Docket number 32993.

5 Just to let the parties know at the
6 outset, I'm going to reserve decision on today's
7 motion, but you will get a ruling promptly.

8 So why don't we start with the entries
9 of appearance for the Plaintiffs.

10 MS. O'DELL: Leigh O'Dell from Beasley
11 Allen on behalf of the Plaintiffs' Steering
12 Committee.

13 MR. PLACITELLA: Chris Placitella. I
14 didn't have it on my schedule, your Honor, and you
15 don't want to see my attire.

16 SPECIAL MASTER SCHNEIDER: All right.

17 If anyone else is going to talk for the
18 Plaintiffs, just introduce yourself so the court
19 reporter can take down your name.

20 And for the Defendants?

21 MR. BUSH: Matthew Bush from King &
22 Spalding for the Defendants. And with me are Susan
23 Sharko and Kristen Fournier.

24 SPECIAL MASTER SCHNEIDER: Okay. So I
25 think that this argument is a little bit unusual, a

1 little bit different than what we usually do,
2 because, as I see it, the argument is to interpret
3 what the Special Master intended in the June order
4 and in the ruling made on the record on July 10 at
5 Mr. Hess' deposition. And I don't think anybody
6 knows what I intended better than me.

7 So here is how I would like to proceed
8 today. I have a couple of just real basic questions,
9 and then I went through each of the objections one by
10 one and I just have some questions about them. And I
11 have a feeling we'll get to all of your arguments
12 when we go through the examples. But as usual, I
13 don't want to cut anybody short, if there is any
14 argument you want to make or anything you want to
15 say, you'll have all the time in the world to say it.

16 Let me start with, am I correct that
17 when you deposed Mr. Hess, you asked him a fair
18 number of questions about these photographs or you
19 call them photomicrographs, is that what they were?

20 MR. BUSH: Yeah, and I think that was
21 directed to the defense, your Honor.

22 SPECIAL MASTER SCHNEIDER: It was.

23 MR. BUSH: Yes, your Honor. We asked
24 questions about the photomicrographs. And as a --
25 well, two things as a housekeeping measure. The

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1 photomicrographs and photographs are really the same
2 thing, they're just micro, because they're images of
3 such small particles so we can call them either one.

4 And just the other small housekeeping,
5 I think Mr. Ludwig should probably enter his
6 appearance for Mr. Hess if he's intending to present
7 argument. We went Plaintiffs and Defendants, which
8 is obviously normal, but this is -- we have a third
9 party here.

10 MR. LUDWIG: Thank you, Mr. Bush.

11 I didn't want to interrupt the Judge,
12 but I'm here on behalf of the deponent. I'm neither
13 Plaintiff nor Defendant.

14 SPECIAL MASTER SCHNEIDER: So getting
15 back to my question, are these photographs of what
16 the microscopist sees through the microscope?

17 MR. BUSH: Well, I think the simple
18 answer to that is yes, your Honor. But what is --
19 what the screen looks like -- I mean what -- yes,
20 your Honor, but they're claiming that they're seeing
21 something different that's not what they're seeing in
22 the images that they produced.

23 So, yes, you're looking down the
24 microscope and you're producing an image and these
25 are the particles that you're looking at, but part of

1 the issue is that there has been this claim that when
2 you're looking down the microscope, you're seeing
3 these colors that aren't appearing in the images that
4 are produced to us.

5 SPECIAL MASTER SCHNEIDER: Here is what
6 I'm confused about. You've made the argument that
7 there is no substitute for looking down the
8 microscope. And the person who looks down the
9 microscope, that's why we have to depose him and
10 that's why you wanted the inspection, because, as I
11 read it, the argument was the photographs would be
12 ineffective in cross-examining Longo.

13 But now you're using the photographs in
14 your examination of Hess. So it seems inconsistent
15 to me. On the one hand you're saying you have to
16 look down the microscope, there is no reasonable
17 alternative. On the other hand, you're asking Hess
18 about these photographs that you're saying are
19 critical to getting to the bottom of the methodology.

20 MR. BUSH: Yes, your Honor. I have a
21 couple responses to that.

22 First of all, the photographs are what
23 we have. If they're going to agree that the
24 photographs do not accurately document the backup
25 data that allows somebody to determine whether this

1 is talc or chrysotile, then this entire opinion
2 should be thrown out. This is what they produced and
3 this is what we have to go on.

4 Secondly, we're looking at the
5 photographs. We see yellow. Our experts are saying
6 yellow. We had this whole discussion at issue about
7 this with the last round of arguments.

8 Their excuse for why, even though we're
9 seeing yellow, something else is happening is, we
10 have to look down the microscope. That's their
11 explanation and their justification for how everyone
12 sees a yellow particle, and they're calling it
13 purple.

14 So what we want to do is show the
15 images at issue and say what is going on here. And
16 there is a lot of questions about that. What color
17 are you calling it? What color is it? What's your
18 basis for calling it that color? That is the entire
19 basis for that analysis. And either he can say -- he
20 can have an answer or he can say I can't answer that
21 because I need to look down the microscope too. And
22 either way, that's really critical information for us
23 as the person who looked down the microscope. And I
24 have further responses, but I see -- it looked like
25 you had another question.

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1 SPECIAL MASTER SCHNEIDER: You could
2 read my mind, Mr. Bush.

3 I have to tell you, I don't recall ever
4 hearing an argument from the Plaintiffs that the
5 photographs were not a substitute for looking down
6 the microscope. If they made that argument, I missed
7 it. That's what I'm trying to get at. You're saying
8 you have to look down the microscope, but yet you're
9 relying on the pictures to get Hess to answer
10 questions about color. It seems inconsistent to me.

11 MR. BUSH: No, your Honor. It is
12 Doctor -- the person who is saying you have to look
13 down the microscope live is Dr. Longo. He's giving
14 us a picture that's yellow. And we're saying, Dr.
15 Longo, you're calling this purple, how are you doing
16 that? And he said --

17 SPECIAL MASTER SCHNEIDER: Mr. Bush, I
18 don't mean to interrupt you. I apologize. But it
19 wasn't -- if I recall correctly, it wasn't Dr. Longo
20 who said I can't look at the photographs, I have to
21 look at the microscope, it was the Defendants who
22 said that.

23 MR. BUSH: Not at all, your Honor.
24 This was exactly what came up at the Clarke hearing
25 which was the New Jersey State Court hearing which

1 was Rule 104 there. It's the equivalent of Rule 702.
2 We asked him a number of questions. It also came up
3 at -- I mean we have it all in the prior briefing
4 from the last time we argued. This came up a lot at
5 the Valadez deposition and other depositions. And
6 this is the sequence of how the questions are asked:
7 What is this particle and how are you saying that
8 that's talc and not chrysotile?

9 And he says, I would need to look down
10 the microscope to answer that question.

11 Then we say, and this is a really
12 important one that we've highlighted a lot: MAS is
13 relying on this edge effect. That's what they're
14 claiming. These colors that they claim to see on the
15 edges of the particles is what they're saying is the
16 key differentiating feature between chrysotile and
17 talc.

18 And so we say, hey, Dr. Longo, isn't
19 that edge effect also on all the talc particles,
20 meaning it's not a differentiating feature, and
21 doesn't that make your entire analysis wrong?

22 And he says: I would have to look down
23 the microscope. That's how I would justify my
24 answer. And this was over and over again. And we
25 had that -- those bullets in this briefing, it was

1 probably 15 times when we asked a question, Dr. Longo
2 said, I would have to be looking down the microscope.

3 And that --

4 SPECIAL MASTER SCHNEIDER: I'm sorry.
5 Go ahead. Finish.

6 MR. BUSH: That necessarily punts the
7 issues to Mr. Hess on all the critical questions,
8 because Mr. Hess is the one looking down the
9 microscope.

10 SPECIAL MASTER SCHNEIDER: I want to
11 hear from Ms. O'Dell, but I think you left out one
12 step.

13 You said you're representing that Dr.
14 Longo said you have to look down the microscope. I
15 haven't heard or seen in the record where someone
16 said Dr. Longo, here is a photograph of what's down
17 the microscope, can you answer the question based on
18 the photograph? I haven't heard, unless I'm missing
19 it, him say I have to look down the microscope. The
20 photograph is not a good reference.

21 MR. BUSH: Your Honor, I think Ms.
22 Fournier is going to have a heart attack over this
23 question. This happened -- this was every single
24 time. And I want to give you maybe three examples of
25 it.

1 One is in the first round of briefing,
2 the Plaintiffs complained, hey, you haven't
3 associated the questions being asked with the images
4 being -- that you're looking at. And so we submitted
5 a chart that associated every image he was being
6 shown with every question so there could be no
7 dispute about what he was being shown and what he was
8 being tested.

9 MS. FOURNIER: I'm so sorry. Just to
10 make sure it's abundantly clear, your Honor. As the
11 questions are being asked, visual on the video, if
12 you happen to watch it instead of reading, an image
13 is up on the screen. The questions almost -- I mean
14 more than 50 percent of the time, there is an image
15 showing that's driving the questions that are being
16 asked. These are not questions in a vacuum about
17 particles, they're about the particles in the report
18 that all have pictures produced that correspond to
19 the particles.

20 MR. BUSH: And the question being
21 asked, we had two examples that we highlighted as
22 like the exemplar of all the sort of bullets, there
23 were 10, 15 examples of this. And we said, your
24 Honor, we want to draw your attention to two
25 examples.

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1 One of them was the question, what is
2 that particle? He was being shown an image and the
3 question is: What is that particle?

4 And he said, I can't answer that
5 without looking down the microscope. And just so
6 there would be absolutely no dispute about this, we
7 launched a video of this with the court and you can
8 watch Dr. Longo not only on the screen, he has his
9 report in front of him and he's flipping through the
10 pictures and you can see him unable to answer the
11 question after an inordinate amount of time of
12 looking at the images.

13 And the second example that we've
14 highlighted is saying: Dr. Longo, isn't this edge
15 effect on all the talc particles? And as Ms.
16 Fournier is explaining, we have an image of those
17 talc particles with this edge effect and we're
18 saying: Isn't this -- doesn't this demonstrate your,
19 quote, entire analysis is wrong?

20 And his answer is: I'm not wrong, I
21 would need to be looking down the microscope.

22 So all these questions are us asking
23 him questions about a particular particle or
24 particles and him saying I would need to look down
25 the microscope to answer the questions. And in

1 particular, to justify why his entire analysis is not
2 wrong he said he had to look down the microscope for
3 that.

4 And this has been the examples we've
5 used in practically every brief on this issue.

6 SPECIAL MASTER SCHNEIDER: I have to
7 assume, I don't know this for a fact, that you filed
8 a Daubert motion to exclude this new opinion from Dr.
9 Longo, correct?

10 MR. BUSH: Yes, we have, your Honor.

11 SPECIAL MASTER SCHNEIDER: Did you
12 raise an argument that his testimony was incomplete
13 because he wouldn't answer these questions?

14 MR. BUSH: We said two things, your
15 Honor. We said, one, the testing is entirely
16 incapable of being tested or verified or reproduced
17 because the reason that he is saying, the way he says
18 he justifies whether the particles are talc or
19 chrysotile, are only when he looks live down the
20 microscope which we're not able to do.

21 And we said, when we tried to talk to
22 the person who actually looked down the microscope,
23 this was obstructed by all these questions not to
24 answer, and we gave a lot of the examples and
25 referenced the motion that we're here at issue

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1 arguing.

2 So we argued both that his inability to
3 identify particles from the micrographs were a reason
4 to exclude his opinion. And there is case law about
5 this, about an inability to document, if you're not
6 documenting your work enough to be verified, that
7 that could be excluded.

8 And we argued the fact that we weren't
9 able to adequately depose the expert who is actually
10 doing the analysis is another reason to exclude him.
11 And that was based on many decisions but in a large
12 part on the Zantac decision, which found that a
13 factor to exclude the expert there was that there was
14 too much reliance on the analysis -- on the analyst,
15 the underlying analyst who wasn't a testifying
16 expert.

17 And here, we're even worse than that
18 because we weren't able -- because when we tried to
19 talk to the underlying analyst, we were obstructed by
20 a barrage of instructions not to answer.

21 SPECIAL MASTER SCHNEIDER: I saw in
22 your papers that apparently you were not permitted to
23 file a reply brief in support of your Daubert
24 motions, am I right?

25 MR. BUSH: The current order, the order

1 as it stands now says no reply briefs for Daubert
2 motions, that's correct.

3 SPECIAL MASTER SCHNEIDER: So what did
4 you intend to do with Hess' deposition testimony?

5 MR. BUSH: We intend -- your Honor, I'm
6 sorry, I don't mean to be frustrated.

7 We have asked for this issue to be
8 accelerated at every step and have constantly said
9 that a problem with this is that there is a Rule 702
10 deadline coming up.

11 And if you recall, your Honor, we
12 actually had to go to you about just scheduling the
13 deposition because we didn't think that the
14 scheduling of the deposition was happening fast
15 enough. And you were saying, well, can't you just
16 all work this out among yourselves, which I
17 completely agree should be the way to handle it, but
18 we've been saying at every step that this is critical
19 and must happen now before the Rule 702 motion. We
20 took the deposition before the Rule 702 motion. So
21 what my expectation was, was we were going to take
22 that testimony and put it in the Rule 702 motion.
23 Instead, what we did was we took all these
24 instructions not to answer and put it in the Rule 702
25 motion because it was all we had left to do.

1 The full expectation was that we were
2 going to be able to use this in the motion. And now
3 we're hamstrung and I think we have to see what
4 happens from your Honor's ruling, but we're going to
5 have to try to figure out a way to get this before
6 the court. But at minimum, it's not the way we
7 wanted to, which was in the initial motion.

8 And to have some sort of supplement at
9 the end is just not an adequate substitute, if we're
10 even permitted to do that, which we don't know.

11 SPECIAL MASTER SCHNEIDER: So if the
12 trial judge agrees with you that Longo's testimony in
13 combination with the non-responsiveness of Hess is
14 critical to satisfying the Daubert standard, you'll
15 be successful in your request to strike Longo, right?

16 MR. BUSH: I mean yes, if the Court
17 agrees with us. But what we -- we didn't want him
18 not to answer the questions.

19 Another way we would be successful is
20 if he says yeah, the edge effect that I'm relying on
21 is on all these other particles, and so there is no
22 way to tell the difference between talc and
23 chrysotile. That would get us a win, too. Maybe he
24 gives that answer, maybe he doesn't, but we didn't
25 take the depo for him to not be able to answer the

1 questions. We want answers to these questions. And
2 it was the very basis -- I mean I don't -- I hear
3 what you're saying, your Honor, as we're arguing on
4 what your intent was, but we highlighted in the
5 initial motion that the reason we needed a deposition
6 of Mr. Hess is because Longo is not giving us
7 answers.

8 And I just want to repeat this example
9 again because I think it's so critical, that we asked
10 Dr. Longo: Isn't your entire analysis wrong because
11 you're not actually seeing a differentiating factor
12 for what you're saying is differentiating? And he
13 says, it's not wrong, I would have to look down the
14 microscope.

15 And what your Honor's opinion says is
16 that there were a lot of missing answers in Dr.
17 Longo's testimony based on this
18 need-to-look-down-the-microscope testimony. And that
19 was the one we highlighted the most.

20 So when we asked the exact same
21 questions to Mr. Hess, he was instructed not to
22 answer. He was instructed not to answer: Isn't the
23 edge effect on these other talc particles?

24 If Dr. Longo says you have to look down
25 the microscope and he never did, and we asked the guy

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1 who looked down the microscope, and he's given an
2 instruction not to answer, we can't get this answer
3 from anybody. Mr. Hess is the key person here. He's
4 the one making all the decisions. He's the one who
5 is actually the expert here. There is almost nothing
6 that's left for Dr. Longo to do.

7 This is just -- let's just be clear.
8 Mr. Hess looks down the microscope. Mr. Hess picks
9 particles. He decides which ones are chrysotile and
10 which ones are talc. He does it based on assigning a
11 color to those particles and he's the one who takes
12 the images that are produced to us to look at it.
13 That leaves almost nothing for Dr. Longo to do. And
14 Plaintiffs can't say, oh, no, no, he is looking at
15 the images and independently verifying what Mr. Hess
16 is doing. Because when we asked Dr. Longo about the
17 images, he says, I would need to look down the
18 microscope, which he never did. So Mr. Hess is the
19 one who is the expert here which is why all the
20 briefing and all the orders called him an expert
21 multiple times.

22 And so we're getting a little ahead of
23 ourselves with this idea that we can't ask him
24 questions as an expert, whatever that means. It just
25 doesn't make sense because he's the expert that

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1 everything rests on, which is what your order says,
2 your Honor, that he's the expert upon which Dr. Longo
3 will rely.

4 SPECIAL MASTER SCHNEIDER: One more
5 second, Ms. O'Dell. I still want to get to you.

6 I'm getting a little ahead of myself.

7 But didn't the order and the ruling in
8 July at the deposition say that Hess could testify
9 about his firsthand knowledge and his personal
10 observation and he wasn't there to compare one test
11 to another or talk about tests that weren't at issue
12 with regard to the new method that Longo used, the 20
13 or 23 tests?

14 So if the question is, Mr. Hess, when
15 you looked down the microscope, what color did you
16 see, he can answer that question, of course. But
17 weren't there questions of the ilk that, well, how
18 come you see this color now and when you did these
19 tests in 2019, you didn't see the color? That wasn't
20 the purpose of Hess' deposition.

21 MR. BUSH: Your Honor, there is a lot
22 there.

23 First of all, I would say 98 or 99
24 percent of the questions fell in the first category.
25 The question of what color are you seeing was given

1 instructions not to answer. The question: Isn't
2 that light bulb adding a darker orange to your
3 testing, was an instruction not to answer. There
4 were just a multitude of questions not to answer all
5 about just the very images and testing that are
6 indisputably at issue in this MDL.

7 SPECIAL MASTER SCHNEIDER: That wasn't
8 the question about -- I recall the question about the
9 lighting that you mentioned, Mr. Bush, and it is
10 absolutely appropriate to ask Mr. Hess, which I don't
11 think was asked, what are the illumination settings
12 on the microscope when you took the test. It's
13 appropriate to ask him, did you set the illumination
14 setting at the maximum level. That is a factual
15 question. That is based on his personal knowledge.
16 But the way you phrased the question, you were asking
17 him an opinion to compare one thing to the other and
18 that's what I said was off limits.

19 MR. BUSH: Well, your Honor, the
20 question -- how else are we supposed to probe the
21 veracity and accuracy of his statements? So we asked
22 them, are you really setting it at the highest level,
23 the question was asked. And then we want to probe
24 whether that's right.

25 SPECIAL MASTER SCHNEIDER: Mr. Bush,

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1 you did not ask him that question.

2 MR. BUSH: Your Honor, we --

3 SPECIAL MASTER SCHNEIDER: I'm sorry.
4 I apologize.

5 At least in the snippets that I read,
6 which were the objections. Maybe at some other
7 portion.

8 MR. BUSH: Right. It came up before,
9 but we don't have to just take his word for it. We
10 can't just say, Mr. Hess, explain to us everything
11 you're doing wrong. And he says: I'm doing nothing
12 wrong. We're like oh, that's his testimony, he
13 testified he's doing nothing wrong. Well, you know
14 what, Defendants, what's your problem?

15 We have an entitlement to probe him on
16 the accuracy of his testimony. And if he's going to
17 say I put it at the maximum setting, we just showed a
18 PLM image and said: Can your microscope get to an
19 image this bright. That is a question that is
20 eminently from Mr. Hess because he's the one doing
21 the analysis, looking down the microscope,
22 controlling the illumination settings. He's the one
23 with 40 years of PLM experience.

24 What is so damaging -- I mean what is
25 so harmful to Mr. Hess to ask a question about, is

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1 your microscope able to produce an image this bright?

2 He should be able to answer that question easily.

3 And I want to get at your -- the first
4 one about the 2019 testing, because that is critical,
5 critical, critical to the issues. And it goes
6 directly to his firsthand knowledge because his
7 firsthand knowledge is him doing the tests in 2019
8 and doing the tests in 2020 and afterwards.

9 And I want to be very clear on this.
10 There is PLM testing that Mr. Hess did of our talc
11 samples in the original round of testing under
12 similar microscopic conditions, meaning the same oil
13 and those sorts of things. Dozens of tests. He
14 doesn't find chrysotile in any of those.

15 Then all of a sudden in 2020, he's
16 finding chrysotile in all these samples. Mr. Hess
17 again. Mr. Hess before, Mr. Hess afterwards. 1.55
18 oil before, 1.55 oil afterwards. It goes directly to
19 the how and why of his testing at issue right now,
20 the new testing, to ask him why were you not able to
21 find chrysotile before and were able to find it now?
22 And we raised it on the first page of our motion.
23 It's just an obvious question to ask him. There is
24 something going on here that they're changing their
25 methodology or not or just changing what they're

1 looking at or changing the results.

2 The fact that it's Mr. Hess looking at
3 the same kinds of samples, our talc, under the same
4 microscopic conditions, both for testing in this MDL
5 and he's getting different results, is fundamentally
6 what is at issue with his chrysotile testing.

7 Yes, it may touch on prior testing, but
8 it goes -- it is at the heart of the how and why he's
9 doing the PLM testing now, the chrysotile testing
10 that's at issue in this motion and in the 2020
11 testing onward.

12 SPECIAL MASTER SCHNEIDER: I have to
13 say, Mr. Bush, I'm not going to ask you a question,
14 we'll go to Ms. O'Dell, but the example you gave is a
15 great example of an objectionable question.

16 The purpose of this argument and the
17 issue to address is whether the questions that you
18 asked fit within the parameters that the Special
19 Master has already set. The boundaries of this
20 deposition are already set. The order and the
21 direction at the beginning of Hess' deposition. The
22 only question now is whether the questions that were
23 objected to fit within the parameters.

24 We are not going back to square one and
25 hearing the issues de novo. The Special Master

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1 unequivocally stated, and in my order you're going to
2 see the page and line number, that the purpose of the
3 deposition is not to compare one to the other. So
4 when you say you want to compare the new test to the
5 2019 test, that is a perfect example of an
6 objectionable question.

7 I know you disagree with me. Obviously
8 you disagree and I respect your disagreement, but
9 we're only here to address whether the questions fit
10 within the parameters that were already set:
11 Firsthand knowledge, personal knowledge, no
12 comparisons, no hypothetical questions.

13 If he's looking down the microscope and
14 he sees a color, he can obviously answer that. He
15 can answer what his settings were. He can answer
16 were they maximum settings. He's not there to answer
17 why did you use this setting rather than that
18 setting. That wasn't the purpose of why his
19 deposition was permitted. He's not a testimonial
20 expert and it was not intended that he be deposed as
21 if he were a testimonial expert.

22 But we've talked a lot. Let's give --

23 MR. BUSH: Your Honor, I need to
24 respond. I understand you want to give Ms. O'Dell a
25 turn. And I understand that this is -- the way you

1 described it is a unique argument because we're
2 talking about your own intent. But I need to respond
3 to that because your opinion, your original written
4 opinion, which gives no limitations on the deposition
5 whatsoever, says that an important testimony is the
6 how and the why of the testing. And so it is
7 directly relevant why he's finding chrysotile now
8 when he didn't before.

9 The other thing I want to say is that
10 your Honor at that depo, right after the page and
11 line said, we'll revisit this afterward. And so now
12 is the time to revisit it.

13 The other thing I want to say about it
14 is, when you said there is not a basis for
15 comparisons, you said that wasn't the arguments that
16 were made in the briefing. And those were the
17 arguments we made in the briefing. On the very first
18 page we said, they're claiming to find chrysotile now
19 when they never did it before.

20 So I think the fact that -- and I
21 understand that I'm arguing about what your intent
22 is, but the fact that you said the why of the testing
23 was relevant, that you said that we persuasively
24 argued that Mr. Hess is making all the key decisions,
25 he's called an expert all the time, the Plaintiffs

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1 invoked the rule for non-testifying experts which
2 allow us to get at his expert opinions, the why of
3 the testing goes directly to why they're finding
4 chrysotile now and not before, that you said we would
5 revisit this, and that the basis of your ruling was
6 this wasn't the arguments that the Defendants made in
7 their motion. And it was in the motion. So I think
8 it's very much at issue in this argument, whether we
9 should be allowed to ask those comparison questions
10 which go directly to the most important issues of
11 Mr. Hess' testing that only Mr. Hess can answer
12 because he's the one doing the analysis.

13 SPECIAL MASTER SCHNEIDER: Ms. O'Dell,
14 anything you want to say?

15 I mean we started this discussion with
16 my confusion about why Defendants were arguing that
17 Longo testified that only looking down the microscope
18 was effective, but yet they're cross-examining Hess
19 on photographs. And then we went off on a tangent.

20 So you may or may not have anything to
21 say. I'm not compelling you to say anything, but I
22 certainly want to give you an opportunity if there is
23 something you want to add.

24 MS. O'DELL: Your Honor, there are many
25 things that I want to say, but for purposes of your

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1 time, I'm going to try to be efficient.

2 I will say this, because I think it's a
3 fundamental sort of construct we need to keep in mind
4 for this testing. I heard Mr. Bush say two or three
5 times in the last three minutes that he's finding
6 chrysotile now, but he did not find chrysotile before
7 in the 2019 and other testing. I assume he's talking
8 about the February 2019 second supplemental report of
9 the MDL, which we have stated over and again in our
10 briefing did not seek to identify chrysotile. It was
11 heavy liquid density separation that was intended to
12 examine Johnson & Johnson's Baby Powder and Shower To
13 Shower for amphibole asbestos, not serpentine mineral
14 like chrysotile. It was not the focus of the
15 testing.

16 So for counsel, who knows that very
17 well, to suggest that somehow they looked for it
18 before, didn't find it, but now they are, and calling
19 into question the methodology is really -- is an
20 inaccurate statement of what was done previously.
21 And I would just want to start with that because I
22 think that is important.

23 Second, as to Dr. Longo's testimony and
24 what he said previously, he testified for two days in
25 the MDL over all of these reports. And there is not

1 one instance where he said I need to look down the
2 microscope, that I can recall. He looked at
3 photomicrographs on the Zoom. We cited that
4 testimony, both in relation to this motion and
5 certainly in the relation to the motion to inspect
6 the MAS lab, and that's something, your Honor, that I
7 would keep in mind.

8 In regard to Mr. Hess' deposition, we
9 had your Honor hear the objection that we made, your
10 Honor issued a ruling, and this was the construct by
11 which we tried to formulate objections.

12 And as you saw from the transcript that
13 you reviewed, it was a hotly contested deposition,
14 but this was the construct that I was working under.
15 It had to be a report at issue in the MDL. And
16 despite what your Honor said three times, Mr. Hess
17 was asked about a report that was issued in a North
18 Carolina court in 2020 that had to do not with
19 Johnson & Johnson Baby Powder, but a work apron that
20 had been tested.

21 He was asked about Cargille glass and
22 testing of Cargille glass.

23 Third, he was asked in Exhibit 27 of
24 the deposition, he was asked about a 2011 report
25 involving not Johnson's Baby Powder, but asbestos

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1 testing, which I am not quite sure even what that is.
2 But obviously, reports that are unrelated to the work
3 in the MDL.

4 We focused on -- any time he was asked,
5 what did you do, what did you see, he responded to
6 questions, your Honor. And specifically on page 61
7 he was asked: How should the illumination be set on
8 the Olympus Microscope when doing this analysis?

9 He responded: I would always set it
10 myself to the highest illumination. That was his
11 response. He gave similar responses at other times
12 during the deposition. That was on page 61 at lines
13 20 through 25.

14 You said don't allow questions and
15 instruct him not to answer questions about comparing
16 his work to others, which we followed your
17 instructions.

18 He was asked about standards, including
19 ISO622-2. And I may have the numbers a little wrong,
20 your Honor, but that's not something that he used in
21 the actual work. That's something Dr. Longo has
22 opined on. And we gave him an instruction not to
23 answer that question.

24 Dr. Longo's reports have a long
25 narrative as a part of the reports. Mr. Hess'

1 limited part, it's not an unimportant part, but it's
2 a limited part to prepare the bench sheets and the
3 photomicrographs that take pictures of the particle
4 of suspicion that he's identified as chrysotile.

5 And he said, and I would direct your
6 Honor to the deposition at page 144 through 147 where
7 he gave a complete analysis of how he did this, how
8 he would line it up, how he would focus on what
9 appeared to be a suspicious particle, how he would
10 make sure it was fibrous in nature. And then he
11 walked through what he did. And once he identified
12 it, if he -- if he identified it as chrysotile, how
13 he would then take a photomicrograph to the best of
14 the machine's ability to capture what he was looking
15 at. And then when he was asked about those
16 questions, about the particle of interest, the
17 chrysotile, he answered those questions to the best
18 of his ability. Your Honor, not with a high
19 resolution photo in a room, but on a screen, Zoom,
20 and often it was placed in a PowerPoint. It actually
21 wasn't even the report that was being issued.

22 So that was very difficult, but he
23 answered all those questions to the best of his
24 ability.

25 Now, Mr. Bush raises the issue about he

1 couldn't talk about talc. There were instances where
2 he was asked about questions regarding talc that
3 weren't in the primary field or the focus of the
4 actual photomicrograph. They were in the
5 photomicrograph, but were not actually the part
6 around the particle or in focus like the particle he
7 was reporting on. They asked him questions and there
8 were certain instances where he didn't report on that
9 particle and it would have been improper to have him
10 give an opinion on the fly in the deposition, which
11 is what we argued should not be appropriate.

12 So there are other instances where, and
13 I would just get the last one, your Honor. He was
14 asked about Dr. Wiley and Dr. Su's reports and what
15 his opinions were. We instructed him not to answer
16 because that's not his view. That's for Dr. Longo as
17 the testifying expert.

18 So we believe that, in fact, he was
19 asked about his methodology and what he saw, about
20 certain photomicrographs, and had they really wanted
21 to know exactly what his process was report by
22 report, they would have shown him those things in a
23 methodical fashion and they would have gotten their
24 answers. But that's not what they did. They kept
25 creating these exhibits, comparing photomicrographs

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1 with the reports at issue with other photos which
2 were unfair.

3 And I would just end with this.

4 Mr. Bush argued a minute ago he was shown an image
5 and said can you make an image this bright.

6 And I would just point out for the
7 court so you know the context, it was an image taken
8 by Dr. Su, he had never seen it before, didn't know
9 the context, didn't know what it was, and he was
10 asked can you make an image that bright. How is a
11 person to answer that question? All he was there to
12 answer is what, in fact, he did do. And he, in every
13 instance, was prepared and would respond to those
14 questions if it was appropriate.

15 So that's what I have, your Honor. And
16 to the degree that they say it colors one thing or it
17 colors another, that's going to be a question for the
18 jury, if this testimony is heard.

19 And I see Mr. Placitella is on video,
20 which he may have something to add and I would invite
21 him to do that.

22 MR. PLACITELLA: I have one thing to
23 add and I apologize for my attire, I didn't have this
24 on my schedule. No disrespect intended.

25 There is a bottom line here. I took

1 Dr. Su's deposition and Dr. Wiley's deposition. And
2 they both said, based upon the photomicrographs taken
3 by Mr. Hess, they came to their own independent
4 conclusion that it was not asbestos.

5 And I said: Did you need anything
6 else, anything else, in order to come to that
7 conclusion?

8 And they said no, I can do that based
9 upon the photo that was generated by Mr. Hess.

10 So all of this, respectfully, is a lot
11 of gamesmanship because their expert is able to give
12 their own opinion, right, based upon the data that
13 was generated. So the questions about how you
14 generated that data are appropriate. His
15 interpretation of the data is not appropriate.

16 That's all I have to say.

17 SPECIAL MASTER SCHNEIDER: If you'll
18 indulge me, let's go to some questions I have about
19 specific objections. And by the time we get through
20 with them, I think we will, my guess is, cover all of
21 the arguments you want to make.

22 I numbered the objections, but I'll
23 give you the page and line number.

24 Number two, page 54, line 17 to page
25 55:25.

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1 MR. BUSH: I'm sorry, your Honor, do
2 you mind repeating that? I was looking --

3 SPECIAL MASTER SCHNEIDER: It's the
4 second objection starting at page 54:17.

5 MR. BUSH: Sure.

6 SPECIAL MASTER SCHNEIDER: What is the
7 question that you wanted to ask that was objected to?

8 MR. BUSH: It was -- it was the
9 question right before, your Honor, on the first one
10 on that page is: Typically, when MAS is identifying
11 chrysotile in Johnson & Johnson, what was being
12 called chrysotile was yellow in parallel, right?

13 And we got all these objections and an
14 instruction not to answer that it has to be about
15 specific reports.

16 So the follow-up was: In the reports
17 where you're identifying chrysotile in Johnson &
18 Johnson, what color are the particles that you're
19 calling chrysotile typically in parallel?

20 It's the question on lines 17 to 20.

21 SPECIAL MASTER SCHNEIDER: And the
22 objection to that, Leigh, is what?

23 MS. O'DELL: Well, we didn't know what
24 report he was talking about, your Honor. I mean was
25 it a report in the MDL or was it not? And I was

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1 trying to ask, and you'll see at lines seven through
2 13. And I said, if you'd like to ask Mr. Hess about
3 specific reports, he's here and he's prepared to
4 respond, but asking for expert opinion beyond the
5 scope is beyond the scope of your order. And we
6 never really got a direction to a report.

7 And your Honor, there are, you know, a
8 number of reports at issue in MDL, but there are a
9 greater number of reports that Dr. Longo has issued
10 over the years after testing Johnson's Baby Powder
11 and a number of other substances.

12 I will tell you from my perspective, I
13 don't have knowledge of those, I can't formulate an
14 analysis on reports. And that's why I was very
15 specific. Okay. Tell us what report you're
16 referring to. And they didn't.

17 Now, he goes on to say, he was asked
18 about line 17, he asked: In your reports identifying
19 chrysotile, what color are the particles that you're
20 calling chrysotile typically in parallel?

21 And he answered that question, which
22 sort of gets really even to the heart of it after the
23 objection that I lodged.

24 MR. BUSH: Sorry. What lines are you
25 referring to where you're saying he answered it?

1 MS. O'DELL: Let me make sure I'm at
2 the right place. Page 54, line 17. He answered the
3 question at line 22 through 24.

4 MR. BUSH: Right. Right. So he
5 doesn't answer the question there because the
6 question is: What color are the particles?

7 And he's saying: I used the wave
8 length at the edge of the particle, not the center.

9 And so the follow-up question is: What
10 color are they?

11 And then the question is: Well, what
12 are you talking about?

13 And then: The particle that you're
14 calling chrysotile in the reports that you're talking
15 about today. We just wanted -- the question is very
16 simple. What color are the particles typically that
17 you're calling chrysotile in the reports we're all
18 here to talk about?

19 He doesn't answer that question there.

20 MS. O'DELL: Well, he doesn't -- well,
21 again, we asked for a specific report. Obviously,
22 Mr. Bush, you and Mr. Dubin are very capable of
23 pointing to a specific report.

24 And, your Honor, I'll direct my
25 comments to you, I'm sorry, I shouldn't be talking to

1 other counsel.

2 SPECIAL MASTER SCHNEIDER: The fourth
3 supplemental report?

4 MS. O'DELL: I'm sorry. I missed that,
5 sir.

6 MR. BUSH: The fourth supplemental
7 report that has at the end the tables that
8 incorporate by reference all of his other prior --
9 the prior testing that he's relying on for purposes
10 of the chrysotile.

11 SPECIAL MASTER SCHNEIDER: No. No.
12 No. No. And I looked for it before we started and
13 I'm sorry I couldn't track it down. There was a
14 chart attached to Dr. Su's report and there was a
15 chart attached to Dr. Wiley's report which identified
16 the specific new PLM test. Those are the tests at
17 issue.

18 MR. BUSH: Your Honor, we went over
19 this all in the last round of arguments. It
20 doesn't -- we think those match up exactly with the
21 ones in Longo's report. But what we should be
22 looking at is not our expert report, it's what
23 testing did Dr. Longo say he's relying on. There are
24 tables at the end of his report that incorporate by
25 reference all his prior testing and we matched up, in

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1 our brief here, every test we were asking a question
2 about to one of those questions.

3 SPECIAL MASTER SCHNEIDER: But I don't
4 know, Mr. Bush, if the tests in Mr. Longo's report
5 are just the new PLM testing method. I don't know
6 that.

7 MR. BUSH: Yes, your Honor.

8 SPECIAL MASTER SCHNEIDER: I limited
9 the deposition to only those tests.

10 MR. BUSH: Yes, your Honor. And look,
11 let me pull up the exhibit so I can show you exactly
12 what the chart is that we were referring to.

13 It's Exhibit D to our motion. I have
14 it in paper copy, so I'm just pulling it up on my
15 screen, if you bear with me.

16 SPECIAL MASTER SCHNEIDER: I have the
17 fourth supplemental report here.

18 MR. BUSH: Okay. So if you look at
19 page -- they don't have page numbers, but if you go
20 to page 15, then the next page which would be 16, has
21 a table of all of his new reports. And if you look
22 at the very right column, there is CSM, chrys
23 percentage. Any time he's reporting something in the
24 CSM chrysotile percentage, that is his new chrysotile
25 testing that he is incorporating by reference in his

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1 new report.

2 SPECIAL MASTER SCHNEIDER: There are,
3 what, seven or eight tables that are attached to the
4 report. Are you incorporating every table?

5 MR. BUSH: This is Dr. Longo's report.
6 And what Dr. Longo says at the beginning of the
7 report is I'm not reproducing all my reports because
8 Johnson & Johnson already has them from all this
9 underlying talc litigation. So I'm just going to put
10 a table at the end. This is what Dr. Longo's -- this
11 is Dr. Longo's report. This is the test that he is
12 incorporating by reference to this MDL. That's what
13 this table is.

14 MS. O'DELL: Your Honor, can I speak to
15 this? I'm so sorry. And I don't want to interrupt
16 you, but I --

17 SPECIAL MASTER SCHNEIDER: Go ahead.

18 MS. O'DELL: Certainly there is the
19 table that you're seeing at the end of his fourth
20 supplemental report. Produced along with that fourth
21 supplemental report were a number of other underlying
22 reports. So you'll see on page -- let me just get to
23 the top, your Honor, just to make it easy.

24 The first sample in the table one is
25 from the Weirick case, W-E-I-R-I-C-K. And that

1 underlying Weirick Report was produced in the MDL as
2 part of the backup material for the fourth
3 supplemental report.

4 And so as I went through the
5 deposition, my guide was actually what we had
6 produced in the MDL as an underlying report. That's
7 how we approached it. And so I feel like that's
8 important to note.

9 I know we compared it to at least Su or
10 Wiley's chart, but that was the guide. And if it was
11 produced in the MDL, there was no objection to the
12 question about the underlying findings.

13 SPECIAL MASTER SCHNEIDER: So, Leigh,
14 tables one to seven, are those the tests that Longo
15 was going to rely upon at trial?

16 MS. O'DELL: For his new testing, his
17 new PLM testing, not -- again, not the prior
18 amphibole testing. Yes.

19 SPECIAL MASTER SCHNEIDER: And tables
20 one to seven, are they only the new testing methods?

21 MS. O'DELL: Yes, they are, your Honor.
22 And, Matt, may I share my screen? Do
23 you mind?

24 MR. BUSH: Sure. Sure. Sorry if I'm
25 blocking that.

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1 MS. O'DELL: No problem.

2 And because I want to give you a sense,
3 your Honor, of what we did share so you'll get the
4 full, and I'm hopeful you're seeing my screen now.

5 SPECIAL MASTER SCHNEIDER: Yes.

6 MS. O'DELL: Are you seeing this folder
7 that I show here?

8 SPECIAL MASTER SCHNEIDER: Yeah, I have
9 the report in front of me.

10 MS. O'DELL: Yes, sir.

11 And I don't know -- I want to make sure
12 you're seeing my folder, and it shows all of the
13 listing of the underlying reports that we produced to
14 Defendants when we made our disclosure in November of
15 2017.

16 SPECIAL MASTER SCHNEIDER: Do you know
17 what I'm referring to when I refer to the chart that
18 was attached to Dr. Su and Dr. Wiley's report?

19 MS. O'DELL: I remember you referring
20 to it, your Honor. I can't tell you I remember it
21 with specificity, but I know what you're talking
22 about.

23 SPECIAL MASTER SCHNEIDER: Do you know
24 if that chart is identical to tables one to seven?

25 MS. O'DELL: I don't know the answer to

1 that, your Honor. I would need to look at that.

2 SPECIAL MASTER SCHNEIDER: Okay.

3 So Matt, is what you want to know is,
4 what color was the chrysotile in tests that are
5 listed in tables one to seven?

6 MR. BUSH: For this question that we're
7 referring to, yes. The question is: What color are
8 you typically -- I'm just going to -- typically when
9 MAS was identifying chrysotile in the reports at
10 issue in tables one through seven, what color were
11 you typically calling chrysotile in parallel?

12 I might not have phrased the question
13 perfectly.

14 SPECIAL MASTER SCHNEIDER: Okay.

15 MS. O'DELL: He goes on to say, your
16 Honor, just to be clear, and birefringence relates to
17 the color. And he was asked on page 56, just
18 following the question we were talking about, what
19 color, what is the refractive index of talc?

20 It has a wide -- a large birefringence,
21 but normally it will be somewhere in the range of
22 around 1.540 to 1.605 based on the experience of what
23 I've seen, which provides information about the color
24 of the talc that he's seeing.

25 I believe that question was answered.

1 MR. BUSH: We're not even up to that.
2 There is a question about; what color
3 are you typically calling chrysotile in the reports
4 at issue?

5 SPECIAL MASTER SCHNEIDER: Next
6 objection.

7 MR. BUSH: Yes.

8 SPECIAL MASTER SCHNEIDER: It's number
9 three on my list, page 58:23.

10 MR. BUSH: Yep.

11 SPECIAL MASTER SCHNEIDER: I was
12 unclear on what exhibit is being referred to in this
13 colloquy.

14 MR. BUSH: This is -- I can tell you
15 which report it is.

16 If we go to table four, row 18 of --
17 and I can share my screen again. This was M70484-001
18 was the report that we were looking at.

19 SPECIAL MASTER SCHNEIDER: Number 18?

20 MR. BUSH: Yeah. What I had written
21 down was table four, row 18, 704804 (sic).

22 SPECIAL MASTER SCHNEIDER: Okay.

23 And is that the only test that's being
24 referred to in this question?

25 MR. BUSH: Yes, your Honor.

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1 SPECIAL MASTER SCHNEIDER: Okay.

2 Next, page 65:17.

3 You asked about the blue light or
4 daylight filter. Was the blue light or daylight
5 filter used on the tests in tables one to seven?

6 MR. BUSH: It is supposed to be used,
7 according to the protocol that he's supposed to be
8 following. And Mr. Hess testified that for these
9 images on this microscope that he did not use a blue
10 light or daylight filter. But it was -- the purpose
11 of the question is that the methodology that he's
12 supposed to be following requires a blue light or
13 daylight filter. And so the question goes to the how
14 and the why of this testing. Why is he not using a
15 blue light filter when the methodology requires it?
16 Does he not know the purpose of it? Or does he know
17 the purpose and is intentionally not using it? And
18 what is the reason that he's not using it?

19 That's why we're asking those
20 questions.

21 MS. O'DELL: Your Honor, at page 65,
22 lines five through 11, he was asked about a blue
23 light or daylight filter and then he answered the
24 question.

25 SPECIAL MASTER SCHNEIDER: Okay.

1 Next is number five on my list, page
2 66:2.

3 Matt, the question that the witness was
4 instructed not to answer was what?

5 MR. BUSH: Starting on lines 11 to 14,
6 I'm asking him now about -- it's a follow-up to the
7 question before.

8 I'm asking him now what his
9 understanding of the purpose of that type of filter
10 is.

11 Are you instructing him not to answer
12 that question?

13 And then he's instructed not to answer.

14 SPECIAL MASTER SCHNEIDER: Okay. He
15 said he did not use that blue light or daylight
16 filter?

17 MR. BUSH: For this set of tests, yes.
18 He testified earlier that he didn't use it or at
19 least couldn't recall using it. And so the question
20 is why, which goes directly to the how and why of the
21 testing that was to be covered at the deposition.

22 SPECIAL MASTER SCHNEIDER: Okay.

23 MS. O'DELL: Your Honor, may I respond
24 to that? If you don't want me to, I'll --

25 SPECIAL MASTER SCHNEIDER: No, go

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1 ahead.

2 MS. O'DELL: I'm just saying, for him,
3 he was asked: Did you use a blue light filter?

4 And if you see on page 68, lines three
5 through seven, he said: I don't recall ever dealing
6 with them, blue light filter or daylight filter. He
7 was asked that again.

8 He responded. That was his role, to
9 say I did it or I didn't. But the methodology and
10 whether it's appropriate, that methodology is for Dr.
11 Longo. And so I would just, you know, for Doctor --
12 excuse me, for Mr. Hess, it wasn't for him to testify
13 to whether the methodology is appropriate, not
14 appropriate. It was what did he do. And he was
15 honest in saying, I don't recall ever dealing with
16 them.

17 MR. BUSH: And your Honor's opinion
18 says we're entitled to ask -- that we're not entitled
19 to assume that Mr. Hess is following the methodology
20 that he's -- the written methodology that he's
21 supposed to. The written methodology says he's
22 required to use a blue light or daylight filter. He
23 says at minimum he doesn't remember ever dealing with
24 that. So why is he not using the blue light filter
25 when the methodology that he's supposed to be

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1 following requires it?

2 It goes directly to the how and the why
3 of the testing.

4 SPECIAL MASTER SCHNEIDER: Why didn't
5 you ask Longo that question?

6 MR. BUSH: Because he's the one at the
7 microscope. Dr. Longo doesn't know what Mr. Hess is
8 doing at the microscope. Dr. Longo says, use the
9 ISO22262-1 methodology. Mr. Hess goes and does it,
10 or doesn't do it appropriately. And so we asked, are
11 you the one who's actually putting on the filter and
12 taking off the filter, using this filter.

13 He's probably the only one who actually
14 knows the answer to that question because he's the
15 one doing it.

16 SPECIAL MASTER SCHNEIDER: Okay.

17 Next one I have is number six, page
18 69:3.

19 You asked if a blue light or daylight
20 filter is being used on this image. What image are
21 you showing him?

22 MR. BUSH: That is an image of -- it's
23 an image of talc that's not one of the ones that's at
24 issue in this report, but it's an MAS image of talc.
25 And so the reason for the questioning is the colors,

1 which is, as you know, your Honor, the key issue in
2 this whole thing is the colors. So why does an MAS
3 image of talc look different in another report than
4 his images?

5 We have no idea what they're doing to
6 make it different.

7 Is it because he removed the blue light
8 filter when doing this testing?

9 Is he doing it intentionally?

10 Is he doing it unintentionally? We
11 don't know because we're not allowed to ask the
12 questions.

13 SPECIAL MASTER SCHNEIDER: Next I have
14 is number 7, page 70:6.

15 MR. BUSH: So this is Vanderbilt test.
16 This is the example -- this is Vanderbilt talc. This
17 is the example we included at the end of our motion.
18 And the reason -- so this is -- the test he's being
19 compared to is not one of the ones in the tables one
20 through seven, but this is why it's super critical,
21 because it's Mr. Hess testing the same sample talc,
22 using the same oil, 1.550, used in about a month
23 apart. And the colors look totally different.

24 We do not know why the colors look
25 totally different. That goes directly to the how and

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1 the why of the testing. And Mr. Hess is the only one
2 who knows because he was the analyst on both of those
3 things. So he's the one controlling the microscope
4 settings. And if he's intentionally changing the
5 settings to get different results, that's really
6 relevant. If he's unintentionally changing the
7 settings to get different results, that's also
8 relevant.

9 What are the different settings?
10 Relevant.

11 All go to the how and the why of the
12 testing. And I will tell you this, your Honor, every
13 single question here goes to the how and the why of
14 the PLM testing at issue in those seven tables.

15 SPECIAL MASTER SCHNEIDER: Number nine,
16 page 76:5.

17 What is a reference sample?

18 MR. BUSH: It's a -- there it's -- this
19 is talc from the USP, the United States Pharmacopeia.
20 It's like a -- it's a non-profit, sort of like a
21 standards organization that has reference samples for
22 talc.

23 So the question is, how come your talc
24 doesn't look like talc in the standard reference
25 images that people use to understand what talc looks

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1 like? Is it because you're changing the settings?
2 What about the settings are different? That's why we
3 want to ask him why his talc looks different.

4 SPECIAL MASTER SCHNEIDER: So is this
5 another instance that doesn't look at tables one to
6 seven?

7 MR. BUSH: It's a published standard,
8 your Honor. It's not asking about other tests that
9 he did or that someone else did. It's a published
10 standard. And the reason this is important is
11 because there is a debate about what color those
12 chrysotile particles look like.

13 And one of the reasons you can tell
14 that the coloring of the images are off is because if
15 the talc particles, that we all know of talc, don't
16 look like talc, then clearly something is off with
17 the coloring.

18 The example we sometimes use is if you
19 saw a picture and the sky was colored purple, that
20 would give you a hint, a very big hint, that
21 something else in that picture was probably also
22 tinted purple if the whole image is colored a
23 different -- is skewed towards a different color.

24 So if the talc images don't look like
25 talc is supposed to look like, that shows why the

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1 whole color is shifted in the wrong direction.

2 So, again, I'll say it every single
3 time, it goes directly to the how and the why of the
4 testing that Mr. Hess did.

5 MS. O'DELL: Your Honor, I would just
6 say, from my perspective, that this is another
7 instance where they're asking him to compare what he
8 did to somebody else. And that was clearly within
9 the scope of your direction to instruct him not to
10 answer.

11 If they want to cross-examine Dr. Longo
12 on the difference in photographs and the USP versus
13 something in one of his reports, he's an expert and
14 that's fair game. But it did not go to the work that
15 Mr. Hess did.

16 SPECIAL MASTER SCHNEIDER: Number 10,
17 page 76:19 to 78:9.

18 What test is referred to here, Matt?

19 MR. BUSH: This is the next one. It's
20 the 79:11? Sorry. I just want to make sure we're on
21 the same page.

22 The one that says Zimmerman Report?

23 SPECIAL MASTER SCHNEIDER: Yeah, 76:19.

24 MR. BUSH: That is the Zimmerman Report
25 that is one of the -- that's one of the reports on

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1 the list. I'll get you the exact number, if you give
2 me a moment.

3 So that is sample M70484 and it is
4 table one, row two in Dr. Longo's fourth supplemental
5 MDL report.

6 SPECIAL MASTER SCHNEIDER: And what is
7 the question that's being asked that's objected to,
8 Matt?

9 MR. BUSH: What color -- so it's a few
10 times, but line two, what color is that?

11 Why don't we start at line 24, so it's
12 page 76 line 24 through -- it must be 77, line two.

13 So this is something that you're
14 calling chrysotile in parallel in 1.550. What color
15 is that?

16 And, your Honor, we have it -- I mean
17 it's the first example in our brief, we have the
18 image that he's being asked about.

19 SPECIAL MASTER SCHNEIDER: Mr. Ludwig,
20 what's the objection on line 22?

21 MS. O'DELL: You're on mute.

22 MR. LUDWIG: I'm sorry, your Honor.

23 If I read this correctly, it was --
24 once again, when it goes to what is the color, it is
25 an objection because it's an opinion -- calls for an

1 opinion -- it's calling for an opinion on that color.

2 SPECIAL MASTER SCHNEIDER: Isn't that
3 what he -- I mean that's -- I said he could testify
4 to his personal observation, firsthand knowledge.
5 He's looking down the microscope, he sees a color,
6 you're saying he can't answer that?

7 MR. LUDWIG: If I recall --

8 MS. O'DELL: Your Honor, I'm sorry if
9 I'm interrupting you, Mr. Ludwig, forgive me. But
10 just maybe it helps a little bit. There was a long
11 colloquy, Judge, and if you get to page 80.

12 MR. LUDWIG: That's what I was going to
13 say. If you get to page 80, he answers the question
14 on page 80, your Honor.

15 Thank you, Leigh. I'm sorry. I was
16 actually getting to that. I was trying to follow
17 through because I think that it goes to -- the
18 question is asked again on 78 through 79 and he says
19 the center part is golden yellow. On page 80, lines
20 two through four.

21 SPECIAL MASTER SCHNEIDER: So if the
22 question was answered, why is it on this list?

23 MR. BUSH: Well, it's on the list for a
24 couple reason, your Honor.

25 One is we shouldn't have to fight

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1 through two or three instructions not to answer to
2 get to every question that we want. This is so
3 clearly relevant that we shouldn't have to have a
4 page of instructions not to answer and back and forth
5 with the attorneys. We should get -- we should just
6 be able to get an answer to this.

7 And second, I'll point out that his
8 answer is that at the edge, which is what I need to
9 look at, I can't tell from the image. So if you want
10 to talk about who's saying they need the image or
11 don't need the image to look at, right here Mr. Hess
12 is saying I can't even tell what the color is of the
13 part that I need to see on the image that I took and
14 produced. That's the answer that he ultimately
15 gives.

16 MR. LUDWIG: But I think if you read
17 the next question, your Honor, Mr. Dubin just goes
18 into, we'll go into edge effect later on.

19 SPECIAL MASTER SCHNEIDER: So what I'm
20 trying to find out, Matt, is this an objection I have
21 to rule on if Mr. Ludwig and Ms. O'Dell are saying
22 this question was answered?

23 MR. BUSH: I mean, your Honor, I would
24 say that I'm not sure that -- look, if you want to go
25 through it question by question, then I'm happy to do

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1 it.

2 SPECIAL MASTER SCHNEIDER: That's what
3 we're doing.

4 MR. BUSH: I think getting guidance to
5 what questions are permissible and what questions are
6 not permissible is going to help because it's not
7 necessarily the case that we want to ask only the X
8 number of questions that you rule are permissible.
9 There may be follow-up questions, there may be
10 something that he says that impacts another question.

11 So I think we deserve a ruling that's
12 saying what color is that of the particle that's at
13 issue in this MDL is a permissible question rather
14 than having to go through this all over again where
15 we fight through ten instructions not to answer just
16 to get an answer from the -- to get a non-answer from
17 the witness.

18 SPECIAL MASTER SCHNEIDER: Okay. Let's
19 go to number -- what I call 18, page 103:5 to 15.

20 What is Cargille glass?

21 MR. BUSH: Sorry. I have 103.

22 So Cargille -- the purpose of this
23 question is Cargille glass is just another substance
24 that you can look at under the microscope. And the
25 key thing here is that it has a single known

1 refractive index. The refractive index is the number
2 that comes from identifying what color the particle
3 is.

4 So even though it has a single known
5 refractive index, sometimes you can get multiple
6 different colors appearing on the edge. But those
7 colors are not part of -- are essentially ignored, or
8 we know they need to be ignored, because it has a
9 known refractive index that matches up with the color
10 that you're seeing in the bulk of the particle.

11 And there can be some internal lighting
12 refractive effects that create this color that's not
13 the true color that you should be looking at for
14 purposes of the refractive index.

15 So it is an example of how these edge
16 effects that you're seeing are not truly the colors
17 you should be looking at, but they're an artifact of
18 the lighting or the imaging. And the question is
19 about does Mr. Hess know about this potential effect
20 for the color to be not the color that you should be
21 reporting.

22 And so it goes directly to the how and
23 the why of his testing of why is he taking the colors
24 that he is, and what parts of the -- what areas --
25 why is he looking at certain areas of the particle

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1 and is that the correct thing to do?

2 SPECIAL MASTER SCHNEIDER: So the short
3 answer to my question is that this question and
4 objection does not involve one of the tests on tables
5 one to seven?

6 MR. BUSH: Your Honor, I'm always going
7 to tell you that it goes to the how and why of all
8 those testing. Every single one.

9 SPECIAL MASTER SCHNEIDER: Okay.

10 MR. BUSH: I'll keep giving that answer
11 every time.

12 SPECIAL MASTER SCHNEIDER: Okay.

13 Next, my number 19, page 109:19.

14 What is the exhibit that is referred to
15 here?

16 MR. BUSH: So ISO2262-1 is the protocol
17 that Mr. Hess is supposed to be following.

18 SPECIAL MASTER SCHNEIDER: Okay.

19 MR. BUSH: And it gives reference
20 images about what chrysotile is supposed to look
21 like. And what the refractive indices, again, the
22 number that comes from the color of the particle are
23 supposed to be. And so this question goes directly
24 to the methodology that he's supposed to be using.

25 SPECIAL MASTER SCHNEIDER: Got it.

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1 Okay. Next one is my number 20, page
2 110:16.

3 MR. BUSH: It's the -- this is the
4 same -- this is the same thing, your Honor. It's
5 asking him about the reference image in the ISO
6 methodology that he's supposed to be following.

7 MS. O'DELL: And, your Honor, can I
8 just say, again, when the image was presented to Mr.
9 Hess, it was an incomplete depiction of what was
10 being examined.

11 Number two, and there is a number of
12 other objections and I don't want to belabor it, but
13 in terms of comparing this other image that he didn't
14 take, we felt that that was outside the bounds of
15 what the Court had ordered. And so that was the
16 reason, because this methodology, he said he has some
17 familiarity with it, but the methodology that he used
18 was methodology that he and Dr. Longo discussed. He
19 testified to that. And also Dr. Longo did as well.
20 And that is the methodology that's reflected in Dr.
21 Longo's report, which certainly does refer to
22 ISO22262.

23 But in terms of interpreting that
24 particular document, that was outside the scope of
25 his role as a fact witness. And that was the reason

1 for the objection.

2 SPECIAL MASTER SCHNEIDER: Next, my 21,
3 page 112:18.

4 This refers to a standard reference.
5 What is meant there, Matt?

6 MR. BUSH: This is still the same.
7 This is all covering the same topic. It's the
8 standard reference -- it's the ISO22262-1 standard
9 reference sample for chrysotile and the protocol that
10 he's supposed to be following. And we have it on
11 page 20 of our brief as exactly what is being shown
12 in these questions.

13 And this is -- and on page 21 of our
14 motion, we show that this is something we had argued
15 specifically in the original motion to compel
16 Mr. Hess' testimony.

17 SPECIAL MASTER SCHNEIDER: My number 22
18 is 123:4. Is this the same as what we just
19 discussed?

20 MR. BUSH: No. This is up to the
21 Valadez Report, which is in the tables one through
22 seven. I'll get you -- it is sample M71614 in his
23 fourth supplemental report. It's table six, row 41.

24 SPECIAL MASTER SCHNEIDER: And what is
25 the question that's objected to here?

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1 MR. BUSH: So I think there ends up
2 being a couple. But lines six through eight, what is
3 the CSDS? CSDS is Central Stop Dispersion Staining.
4 That's just the name of the color-based method that's
5 being used. So it's, what is the CSDS color that you
6 would use to assign a refractive index to that
7 particle?

8 MS. O'DELL: And I -- I'm sorry.
9 Excuse me.

10 SPECIAL MASTER SCHNEIDER: I'm a
11 little -- help me understand this one.

12 Is this asking about the methodology
13 that he used during this specific test?

14 MR. BUSH: I'm sorry. Is that a
15 question for me, your Honor, or for --

16 SPECIAL MASTER SCHNEIDER: Yes.

17 MR. BUSH: Yes. He has an image and
18 we're asking him what is the color for the talc -- we
19 direct -- on line four through six, we direct him to
20 a talc particle and we ask: What is the color that
21 you would assign a refractive index to that particle.
22 So what color would you call that particle? This is
23 in the tests that are in Dr. Longo's report at issue
24 in this MDL differentiating talc from chrysotile is
25 the entire purpose of this analysis. If he can't

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1 answer, what's the color of the talc particles, then
2 there is no reason for any of us to be here.

3 SPECIAL MASTER SCHNEIDER: Help me --
4 one second, Leigh.

5 Help me understand, again, what CSDS
6 color is?

7 MR. BUSH: CSDS stands for Central Stop
8 Dispersion Staining, and it is the name of just the
9 broad method that's being used where you coat the
10 material in a particular oil and choose what color
11 it's being used.

12 The question would read identically if
13 you deleted CSDS, it's just a slightly more technical
14 term to say what color are you calling it.

15 SPECIAL MASTER SCHNEIDER: Okay. And
16 it says the bottom left. The bottom left of what?

17 MR. BUSH: Of the image that he was
18 being -- that he was being shown and directed to from
19 the reports at issue that are on tables one through
20 seven.

21 SPECIAL MASTER SCHNEIDER: Okay.

22 Leigh, did you want to address this?

23 MS. O'DELL: Yes, your Honor.

24 Number one is that this was an image,
25 if you go back, you'll look at the bottom of page 121

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1 and it goes on. At different points he's saying that
2 he can't make the determination from a
3 photomicrograph on a screen. And at different times,
4 and I think it's the page before, he says it's not in
5 focus.

6 And they're asking him on the fly to
7 make a determination about a particle that he made no
8 finding on. It's in the photomicrograph, but he made
9 no finding. And so they're asking him on a Zoom for
10 a particle that's outside of -- that's not in focus
11 to make a determination.

12 And he says, you know, he says and he
13 was asked on line 13 through 16 on page 122.

14 So those talc plates, did the
15 reflective index that you assigned to them based on
16 their edges, did that correspond with red?

17 He says: I would not give it the same.

18 He's talking about -- and then he says:
19 No, I would not give it the same.

20 So he tries to answer the question, but
21 the bottom line is, he didn't analyze talc particles
22 and report on those. And so for them to ask him to
23 do that in this context on Zoom in a photomicrograph
24 that is focused on that image that he's reporting on,
25 we felt was inappropriate. And that's why I made the

1 objection. And I made it in a more fulsome way on
2 page 124 because he was asked again, what is the CSDS
3 color you were assigning to talc plates that we're
4 looking at. And that's where I give the objection.

5 And so, your Honor, it's not fair, you
6 know -- it's one thing if it's something that has
7 been focused on and he's reporting on as a chrysotile
8 image. It's another thing if it's a talc particle on
9 the edge of a photomicrograph and it's not in focus.

10 MR. BUSH: Your Honor, the pic -- these
11 kind of photos don't have like a focused part in the
12 center and a blurry part on the outside. The entire
13 image is in the same focus.

14 If Mr. Hess is claiming it's not in
15 focus enough, that has to do with the entire image
16 and it's the image he himself took and is supposed to
17 set the photos of. The entire purpose of the analysis
18 is to distinguish talc from chrysotile. This is
19 literally the same question, it may have been a
20 different particle, that we asked Dr. Longo. What is
21 that particle over there? And he said, I would have
22 to be looking down the microscope.

23 We asked him, well, is it talc or is it
24 chrysotile? He said, I would have to look down the
25 microscope.

1 Now we ask the person looking down the
2 microscope, what are these particles, and now we're
3 being told, well, he can't answer that question
4 either.

5 So who is the person that we're
6 supposed to ask why the talc particles look identical
7 to the chrysotile particles? If he can't answer the
8 question, then let him testify he can't answer the
9 question. And then we'll go back and forth on this,
10 are the photographs good enough, are they documented
11 enough, are they claiming that you need to look down
12 the microscope.

13 If he can't answer, then let the person
14 with 40 years of PLM experience, who all of the PLM
15 testing relies on, who made all the key decisions say
16 I can't answer that question. But that's not for
17 them to object and say, well, it's too out of focus
18 for him to answer. If he can't answer that question,
19 then he needs to testify to that.

20 MS. O'DELL: Well, he said, I would not
21 give it the same. He said that twice. But anyway.

22 MR. BUSH: Right. And so what color is
23 it? What color is he calling talc particles? We
24 don't know. They look yellow to me, just like all
25 the other particles, we put a number of examples in

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1 them.

2 We want to know how is he able, if he
3 looks at a field of particles, they're all yellow, he
4 picks out one and says that one is chrysotile and the
5 others aren't. We want to know, how in the world is
6 he making that distinction between what is chrysotile
7 and what is talc? It is the fundamental basis of the
8 entire analysis that he's looking down the microscope
9 to look at and that Dr. Longo is saying that the only
10 way to make that determination is to look down the
11 microscope. This is just "the" "the" central
12 question at issue in this case-defining issue, is why
13 are you calling out some yellows as talc and some
14 yellows as chrysotile?

15 It's just -- it is fundamentally what
16 this is all about.

17 MR. LUDWIG: And I think that question,
18 though, your Honor, not to step on Ms. O'Dell's toes,
19 but I think if you go back to page 144, I think
20 that's where -- he's never asked how he does that,
21 but 144 to 147 it goes a little bit to fibrosity, and
22 if I recall this question, I hope I remember it
23 correctly, Mr. Dubin is sort of cherry picking
24 something off the image and we made our objection
25 based on that. I think it was sort of, once again,

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1 asking about a specific particle that was not part of
2 the actual analysis on that image. That's the reason
3 why we made that objection. And I mean --

4 MR. BUSH: He's looking at all these
5 particles and he's saying that one I'm not going to
6 call chrysotile. This one I am. And he's picking
7 that one to call chrysotile. There is just no
8 fundamental way to do that analysis without looking
9 at all the other particles and deciding that those
10 are not asbestos.

11 And so this is -- this is the heart of
12 what looking down the microscope and making the
13 decisions is doing. All the key decisions that we
14 argued and your Honor's order says he's making.

15 SPECIAL MASTER SCHNEIDER: I got it.

16 The next one I have is number 23, page
17 125:21.

18 Matt, what is the significance of this
19 roundness plate that you ask about?

20 MR. BUSH: This is the same issue.

21 All we're trying to do here is direct
22 his attention to a particle, and we don't even get a
23 chance to do that because he was instructed not to
24 answer the question: Do you see that?

25 All this question was trying to do was

1 saying, are we on the same page of what particle I
2 want to ask you questions about.

3 SPECIAL MASTER SCHNEIDER: So do you
4 want to know does Hess see a rounded plate?

5 MR. BUSH: No. We want to know, are
6 you following me with what particle I want to ask you
7 a question about. Are we on the same page that when
8 I want to ask you follow-up questions about a
9 particle, are you and I -- I just want to make sure
10 we're talking about the same one. That's all that's
11 happening.

12 And I can show you exactly, because we
13 have this in our brief, there is not really -- right,
14 so we're here. And the question is, if you look at
15 the top of the two arrows, which is here, and then
16 you move your eye over to the left, there is a
17 rounded talc plate. This particle, rounded, talc
18 plate. Do you see what I'm talking about so that I
19 can ask you further questions about that particle?

20 And we're instructed not to answer
21 that. Even that question he was instructed not to
22 answer.

23 MS. O'DELL: Your Honor, and then it
24 goes on on page 126, starting at line 23, and down to
25 127, line 11.

1 He's actually asked about the
2 chrysotile particle that is being reported in the
3 image. And he's asked about refracted indices and do
4 you know what color. And he responds to that
5 question truthfully. And he says: In that sense, I
6 don't recall the specific color.

7 And then he goes on, he's asked other
8 questions.

9 And I guess the two things I would say
10 about it, your Honor, is number one, this is a small
11 portion of a larger photomicrograph that's presented
12 in a report. That's one thing.

13 And number two is, when he was asked
14 questions about his chrysotile finding, to my --
15 after review of the deposition again, I found no
16 instance where it was a report at issue in this case
17 where Mr. Hess did not respond to those questions
18 about those particles that he specifically was
19 reporting were chrysotile.

20 MR. BUSH: So the question at issue
21 this time is about a talc particle. So we move on to
22 other questions that happen later about chrysotile
23 are irrelevant to this question.

24 The question was: Do you see what
25 particle I'm looking at because I want to ask you

1 questions about it.

2 And he was instructed not to answer, so
3 we couldn't ask more follow-up questions about that
4 particle.

5 So this is just -- it's all the same
6 arguments I just made. It's an image in his report.
7 The snippets I put in the brief are because we
8 couldn't put full page images in the brief with our
9 page limit.

10 To make sure we cured all the
11 Plaintiffs' objections, we attached as exhibits the
12 full reports that were always at issue and directed
13 them to what page number the reports were coming
14 from. So they had all -- this objection that, well,
15 these were just snippets or that they weren't in
16 focus, right, they had all the images that they
17 themselves produced and they were all marked as
18 exhibits to the deposition. And all the ones at
19 issue are exhibits to this brief, to our motions, so
20 that you can see them.

21 This was just, can you see the particle
22 so I can ask you questions about that. I do not
23 understand how that is possibly an instruction not to
24 answer that question. It's barely even asking him a
25 question yet.

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1 MS. O'DELL: Your Honor, I would just
2 say, I have no doubt that they attached the reports
3 to any briefing, but for purposes of the deposition,
4 there are many instances where Mr. Hess only had a
5 created image, a created PowerPoint, or a smaller
6 portion of a photomicrograph. And that's -- I would
7 argue that that's not an appropriate way to examine a
8 witness.

9 SPECIAL MASTER SCHNEIDER: Number 25.
10 Matt, what's the question that's objected to?

11 MR. BUSH: Number 25 is page 126, line
12 8?

13 SPECIAL MASTER SCHNEIDER: 128:3.

14 MR. BUSH: Oh, 128:3.

15 So the question is, if you get -- it's
16 on page 17 of the exhibit. So it's lines 21 to 22.

17 You might need to read up a little to
18 get the context, but the question is: The same type
19 of purple or red colors that are on the talc plates.

20 So if you look up, he's saying: You're
21 calling the edge that you saw purple and magenta,
22 right? So the edge where you're claiming, Mr. Hess,
23 is that there is an edge around the chrysotile
24 particle that's purple or magenta, right?

25 Yes, that's correct.

1 The same kind of purple or red colors
2 that are on the talc plates, that's the question that
3 was objected to. And that's exactly the one that we
4 highlighted in the brief and I highlighted in our
5 argument, which is when we asked Dr. Longo, well,
6 isn't this edge effect that you're claiming is the
7 basis for calling something chrysotile also on the
8 talc plates, he said, well, I'd have to look down the
9 microscope. And so when we asked nearly the
10 identical question to Mr. Hess, we're instructed not
11 to answer which prevents us from getting an answer to
12 that question from anybody.

13 SPECIAL MASTER SCHNEIDER: And to
14 clarify, is that one of the tests in tables one to
15 seven?

16 MR. BUSH: Yes, your Honor. It's the
17 Valadez Report. So this series of questions for a
18 little bit is all about that report.

19 SPECIAL MASTER SCHNEIDER: Okay. Next
20 is 26, 129:10.

21 Again, Matt, what's the question?

22 MR. BUSH: Lines 18 to 22. Without
23 those edges, without those sort of red colors at the
24 edges, then the CSDS color that you would have had to
25 assign the particle would correspond to yellow,

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1 right?

2 SPECIAL MASTER SCHNEIDER: And this is
3 referring to the same test as the previous objection?

4 MR. BUSH: Yes, your Honor.

5 In the brief, we -- in our motion, we
6 connect every single one to the exact image that's
7 being looked at. But this is one of the images in
8 the Valadez Report, which is in tables one through
9 seven, sample M71614.

10 MS. O'DELL: And, your Honor, on page
11 130 it continues.

12 He says: How can you tell whether or
13 not the red that you're seeing on the edges is an
14 artifact of focus?

15 And then he answers: By assuring that
16 my particle is in focus.

17 And so he does go on to comment about
18 that.

19 And then he's asked additional
20 questions.

21 MR. BUSH: And that's a different
22 question. He was instructed not to answer one
23 question, and he answered a different question.

24 MS. O'DELL: But if the follow-up
25 question goes to the substance of what was being

1 asked, your Honor, I would argue that there is no
2 prejudice.

3 MR. BUSH: That's just not how a
4 deposition -- they don't get to pick and choose the
5 way we ask the questions.

6 The question is: If you don't have the
7 edge effect, what color is left? Is it yellow? If
8 you weren't relying on the edges, would this be a
9 yellow color?

10 We're entitled to get that question.

11 It still goes to the heart of what he's
12 seeing.

13 MS. O'DELL: It --

14 SPECIAL MASTER SCHNEIDER: Next is my
15 27, page 136:5.

16 Is the Valadez Report part of what's at
17 issue?

18 MR. BUSH: It's still the same one, the
19 same sample number I just read off.

20 SPECIAL MASTER SCHNEIDER: Okay.

21 I'm skipping ahead to my number 31,
22 which is page 143, lines 11 to 25.

23 What is the question, Matt?

24 MR. BUSH: The question is: The same
25 types of edge effects that you are relying on to call

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1 particles chrysotile in Johnson & Johnson are also
2 present in the talc plates in your analysis, is that
3 true?

4 SPECIAL MASTER SCHNEIDER: Help me
5 again. What's referred to as the talc plates? What
6 is --

7 MR. BUSH: So, your Honor, the reason
8 they call it a talc plate is because it's shaped like
9 a plate. Like that's why -- talc particles --
10 imagine a talc particle like a pancake. So a talc
11 particle is often going to be circular.

12 Sometimes, even if you're looking at
13 something -- this isn't a circle, your Honor, so it's
14 not the best example, but even if you're looking at
15 something flat, if you look at it this way, it looks
16 long and thin. The other thing that can happen with
17 a talc particle is even though it's flat, it can get
18 rolled up so it ends up looking like this. And so
19 it's not flat.

20 But a talc template plate is what --
21 when it looks like a flat, big circle, that's how you
22 know it's a talc plate.

23 SPECIAL MASTER SCHNEIDER: In this
24 question, are you referring to a specific test at
25 issue?

1 MR. BUSH: I believe this is the one
2 that -- this is the same Valadez Report, your Honor,
3 but it's the same issue which is they're relying on
4 the edge effects for all these reports that are at
5 issue in this test. That's what we're referring to.

6 The only time they're relying on edge
7 effects is in the testing at issue in this MDL. The
8 only time. The question inherently is only about the
9 testing at issue in this report, in Dr. Longo's
10 report.

11 MS. O'DELL: And I think -- I'm not
12 sure what Mr. Bush is talking about, because there is
13 chrysotile testing that Dr. Longo has done that's
14 outside the reports in this MDL. So I'm not sure
15 exactly what was being said there.

16 But we were shown -- or Mr. Hess was
17 shown exhibit -- what I believe to be 21. And it was
18 not clear, the context. And that's what I said.

19 He says: I've tried to ask you this
20 already, Mr. Hess, but the same type of edge effects
21 that you're relying on to call talc -- call particles
22 chrysotile in Johnson & Johnson are also present on
23 talc plates in your analysis, is that true?

24 And just based on our prior objections
25 regarding these on-the-fly analyses of talc, I

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1 instructed him not to answer.

2 And we got this exhibit, your Honor.

3 It wasn't clear what it was from at that point. And
4 this is what was put on the screen. And I made an
5 objection because -- and I said I don't know what
6 particles are being depicted from who knows what.
7 It's misleading and not representative of what's
8 actually in the reports.

9 And so Exhibit 22 appears to be the
10 entire report, but actually what was on the screen
11 was not everything. It was just an image. And I
12 made an objection on that basis and instructed him
13 not to answer.

14 MR. BUSH: Your Honor, exhibit -- let's
15 pull up the exhibits. I have them right here.
16 Exhibit --

17 MS. O'DELL: And just let me be clear,
18 Matt, because that's what I just said. The exhibit
19 was the entire report. That was not what was on the
20 screen. What was on the screen was this
21 photomicrograph that wasn't clear where it was from
22 or what the page of the report was and what was being
23 asked.

24 And I can say with confidence to the
25 Court, I was very vigilant that if they were asking

1 about a report, I wanted to know what report and what
2 page. So I, for one thing, could pull it up and
3 ensure that we had a context for what was being
4 asked.

5 And in this instance, it's not terribly
6 clear on the record, but I will represent to the
7 Court there was an image pulled up, we were not clear
8 where it was from, what was being asked, and I
9 instructed him not to answer.

10 SPECIAL MASTER SCHNEIDER: All right.

11 MR. BUSH: I want to say for the
12 record, here is Exhibit 21. Exhibit 21 is the
13 Valadez Report, M71614. Same one that I've been
14 referring to that is in the tables in Dr. Longo's
15 report, table six, row 41.

16 Exhibit 22 moved on to a totally
17 different topic, which is about where buttons are on
18 the microscope.

19 This is Exhibit 22 that I'm showing
20 you.

21 The question is inherently about the
22 testing that he's doing at issue in the MDL. That's
23 what we wanted to ask about. We're not trying to ask
24 a whole bunch of questions about other sorts of
25 things. Every question went to and was relevant to

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1 the testing at issue in these reports.

2 SPECIAL MASTER SCHNEIDER: All right.

3 I only have one or two more.

4 My number 36 is page 159, 15 to 25.

5 What is Calidria?

6 MR. BUSH: Okay. You said 159:15 to
7 25?

8 SPECIAL MASTER SCHNEIDER: Correct.

9 MR. BUSH: Okay.

10 Calidria is a unique kind of chrysotile
11 asbestos that is part of Dr. Longo's testing and at
12 issue in this report.

13 So this is how it goes down. Dr. Longo
14 has testified that what was critical in order for his
15 analysts or analyst, Mr. Hess, to finding chrysotile
16 and being able to differentiate it from talc is this
17 Calidria reference sample. Calidria is a unique form
18 of chrysotile.

19 What they did was MAS took Calidria,
20 took a sample. Mr. Hess looked at the sample under a
21 PLM microscope and took images of it. And then what
22 Dr. Longo has testified is that comparing the
23 Calidria reference sample to the chrysotile, what
24 they're claiming is chrysotile in Johnson & Johnson
25 talc, was the key step in order to differen -- in

1 order for them to understand why they're finding
2 chrysotile. And that the only reason that all the
3 labs everywhere else in the country is not finding
4 chrysotile is because of this reference sample.

5 Now, what the Plaintiffs are going to
6 say is this wasn't produced in this MDL. But Dr.
7 Longo has testified that this was the key step that
8 they are relying on for all this testing that's at
9 issue in this MDL.

10 So I don't think they can really say
11 this is not -- this isn't an issue in the MDL because
12 it is the critical step, according to Dr. Longo, for
13 differentiating talc from asbestos, is looking at
14 this reference sample that MAS created and that Mr.
15 Hess took an image of.

16 SPECIAL MASTER SCHNEIDER: So did you
17 question Dr. Longo about this issue?

18 MR. BUSH: We have questioned Dr. Longo
19 about the reference sample, but Mr. -- and he says
20 the critical step is to compare the chrysotile
21 reference and sample that they created and the -- and
22 what they're claiming to find is chrysotile.

23 And when we asked him questions, I
24 think there is one that we might have skipped over,
25 your Honor, which is, are you really calling these

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1 same things -- are you really saying that the
2 chrysotile in your reference sample is the same color
3 as what you're claiming is chrysotile in talc, we
4 were instructed not to answer.

5 I also want to say, your Honor, this
6 was at issue in the original briefing on the motion
7 to compel Hess' testimony. Mr. Hess -- Dr. Longo
8 testified that Mr. Hess is the one who came up with
9 the idea of using a chrysotile -- a Calidria
10 reference sample.

11 So Mr. Hess comes up with the idea to
12 use the reference sample. Then it forms a critical
13 component of their analysis. The component is,
14 compare what I claim is chrysotile to what we are
15 saying is Calidria in this reference sample, that
16 that's what you have to do for the analysis.

17 Mr. Hess looks down the microscope,
18 takes a picture of Calidria. He looks down the
19 microscope, takes a picture himself of what he's
20 calling chrysotile, and then Dr. Longo says a key
21 component of the analysis is comparing those two
22 things.

23 All of this -- it was Mr. Hess' idea
24 and Mr. Hess' execution, and what Dr. Longo says is a
25 critical step of -- a necessary step to the analysis.

1 So all of this is totally directly relevant, not just
2 to the testing at issue in this MDL, but to Mr. Hess
3 in particular who's the one who came up with this
4 idea.

5 SPECIAL MASTER SCHNEIDER: So when you
6 asked Longo about this idea, did he not answer the
7 question? Or he deferred completely and wholly to
8 Mr. Hess?

9 MR. BUSH: Your Honor, I can't recall
10 every time like we've asked him about the Calidria
11 reference sample and what he said. What he said is
12 that this is critical and that Mr. Hess is the one
13 who came up with the idea. And so Mr. Hess is the
14 one looking down the microscope and taking all these
15 images. So this is directly at issue to what is --
16 to what Mr. Hess is doing.

17 MS. O'DELL: Your Honor, if I could
18 just cite very briefly.

19 On page 158, lines two through four,
20 Mr. Hess testifies that it was a collaboration
21 between he and Dr. Longo to identify Calidria as a
22 reference. He testified to that. He was asked on
23 page 159, 11 through 14: No question if I look at
24 Calidria in 1.550, I can see generally a magenta in
25 parallel and blue in perpendicular, right?

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1 Answer: I have seen that in my
2 experience.

3 He answered the question.

4 But this is the objectionable question.
5 Because Mr. Dubin goes on to say: So how is it in
6 your view that somehow Calidria is also showing gold
7 and yellow?

8 He sort of leaves that question and he
9 says: What property of physics changes it so
10 sometimes when you're finding it, it's to your golden
11 yellow as opposed to magenta?

12 That was an objectionable question.
13 He's not there to talk about physics. He answered a
14 question about what he's seen in his experience and
15 to go beyond that, they're seeking expert opinion.
16 And that was the instruction not to answer.

17 MR. BUSH: Your Honor, I want to show
18 you the image.

19 This is the chrysotile reference
20 sample. What Mr. Hess acknowledged is that all this
21 blue around here is chrysotile. Then they pick as
22 their reference this one yellow-looking thing. And
23 the question is: Why is he doing it and is that
24 really chrysotile?

25 The only way it serves as an asbestos

1 reference sample is if it's actually asbestos. And
2 there is a lot of evidence that this particular
3 outlier particle they picked is not asbestos.

4 For example, are there impurities in
5 chrysotile samples and Calidria samples? There are.
6 He was instructed not to answer that question even
7 though he came up with the whole idea for this.

8 So then the question is: Okay. If all
9 this is blue and all this is chrysotile, why did you
10 pick this one? You're saying that chrysotile changes
11 color, but even though it's always blue, somehow it
12 changes to yellow and we're going to pick just the
13 yellow one. How is that even possible that that
14 happens? All this relates to the standard he
15 created. So if he doesn't know about impurities in
16 the sample or how the colors change, he's using it as
17 a reference for the color and it was his idea. So if
18 he doesn't know how these colors match up to actual
19 chrysotile, then it can't serve as a reference
20 standard. This is all his idea.

21 And this concept that he can't possibly
22 talk about it because it's about his expert opinion,
23 he came up with this idea and he's the one
24 implementing this idea. So all the questions are
25 directly relevant to Mr. Hess' work that's at issue

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1 in this MDL.

2 SPECIAL MASTER SCHNEIDER: Okay. This
3 is my last question. What I call number 39, page
4 174:2.

5 Matt, what's the question?

6 MR. BUSH: Well, what the question ends
7 up being is just -- there doesn't end up being a
8 question. It's just about this entire reference
9 sample.

10 So if you look at line -- it's on page
11 24 of the exhibit, lines 10 to 14. So it looks like
12 it's page 175 at this point.

13 Are you claiming that you're going to
14 stop Mr. Hess -- this person, Mr. Hess, from talking
15 about the references to images for alleged chrysotile
16 in Johnson & Johnson? If so instruct him and let's
17 have it at that.

18 So the question is just: Are you
19 instructing him not to answer anything about this
20 reference sample?

21 SPECIAL MASTER SCHNEIDER: I think you
22 explained it before. Can you explain again what a
23 reference sample is?

24 MR. BUSH: Right.

25 So one way it helps you know whether

1 what you're looking -- you want to know if what
2 you're looking at is talc or asbestos. So one thing
3 you can do is look at an image of known talc or an
4 image of known asbestos. If the particle looks like
5 a known talc particle, that's going to show it's
6 talc. If the particle looks like a known asbestos
7 particle, then you know it's asbestos.

8 What Dr. Longo has said is that normal
9 chrysotile doesn't look like the chrysotile we're
10 finding. So Mr. Hess came up with this idea of let's
11 use a reference sample for this unique form of
12 chrysotile called Calidria. And they're claiming
13 that this reference sample unlocked their ability to
14 differentiate talc from chrysotile because it gave
15 them a reference, a point of comparison to look at.

16 And one of the big problems with this
17 is, is it actually a known asbestos particle or is it
18 an impurity in the sample? And one of the reasons
19 that that is -- raises a lot of eyebrows is why did
20 they pick, of the hundreds of particles that are blue
21 in this image, why did they pick the one yellowish
22 particle and are they sure that it's really asbestos?

23 And if Mr. Hess came up with the idea
24 and it's implementing the idea, then he should be
25 able to answer these questions.

1 MS. O'DELL: And, your Honor, I started
2 the objection. It was -- the exhibit was introduced
3 on page 69. It was put up. And I said to Mr. Dubin:
4 What report did this image come from? So we could
5 have some kind of context. And we never got an
6 answer. They said it's a reference image that he's
7 been using to compare.

8 And I said: But this is not an image
9 that's been produced in the MDL in relation to Dr.
10 Longo's testimony.

11 I go on to ask where it came from. And
12 that he's been asked images -- I don't know where
13 it's from, what the context is, and it never arose in
14 the two-day deposition with Dr. Longo.

15 And so --

16 MR. BUSH: And --

17 MS. O'DELL: Just if I can finish.

18 So if this has been an issue in some
19 other case, I don't have any information about that.
20 And that was one of the bases for the objection.

21 And so if you read through the
22 objections, your Honor, page 174 and 175, that was
23 really what was at issue.

24 MR. BUSH: Your Honor, this doesn't
25 come -- this image did not come originally attached

1 to a report.

2 In the Valadez case he said he -- in
3 the Valadez Report, the one at issue in this MDL, he
4 said he used a Calidria reference sample. And we
5 said, hey, you didn't actually produce the images of
6 your sample. So they produced them independently,
7 they just said, here is the three or four images that
8 we're using for the reference sample. So it didn't
9 come -- it wasn't originally attached to any report
10 because we had to go seek it out and ask for it.

11 Dr. Longo has testified this is the key
12 that unlocks their ability to identifying chrysotile
13 in this testing. The fact that he said it in another
14 case doesn't make it any less true in this case
15 because it's the same testing that's at issue.

16 So this is the critical step that he's
17 relying on and that Mr. Hess is supposed to do.

18 We cited it in the reply brief, we
19 cited it in our motion, we cited it in the motion
20 last time that he said the reason that no other lab
21 in the country is able to identify chrysotile is
22 because they don't have this sheet, this reference
23 sample, and he testified that an analyst would not be
24 able to identify chrysotile without this reference
25 sample. So the reference sample is a necessary

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1 component of the testing at issue in this MDL.

2 MS. O'DELL: Your Honor --

3 SPECIAL MASTER SCHNEIDER: It's your
4 motion, you'll have the last word, Matt.

5 Leigh, do you want to add anything?
6 The floor is yours. Anything you want to add to the
7 extent it hasn't already been mentioned?

8 MS. O'DELL: Your Honor, I think we've
9 covered it at length.

10 I would just say that the effort of
11 counsel for Plaintiffs' Steering Committee was to
12 make sure that the deposition proceeded in a way that
13 was not obstructed, but was consistent with the
14 Court's ruling.

15 SPECIAL MASTER SCHNEIDER: Matt, last
16 word.

17 MR. BUSH: My last word, your Honor,
18 I'm going to just say it again, which is every single
19 question that was asked went to the how and the why
20 of the testing Mr. Hess did. There was no question
21 that was off on a tangent to try to sneak in some
22 questions about some other case. Every question was
23 relevant to the how and the why of the testing that
24 your Honor's opinion said could be covered. And I
25 haven't heard anything from Plaintiffs disputing

1 that. Every question we asked was relevant and we
2 did it for a reason and it was all relevant to this
3 PLM testing. We weren't there to waste time, we
4 certainly weren't there to harass him. We were there
5 to ask questions relevant to this PLM test that's at
6 issue. And every single question was relevant to the
7 PLM tests that were at issue in this MDL.

8 SPECIAL MASTER SCHNEIDER: Thank you,
9 Counsel.

10 The record is closed on this motion.

11 You'll get the ruling promptly and I
12 thank you, as usual, for your excellent work product.

13 And have a good night. Thank you.

14 MS. O'DELL: Thank you, your Honor.

15 (Hearing Adjourned)
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C E R T I F I C A T E

I, Theresa Mastroianni Kugler, a Notary Public and Certified Court Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place, and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a relative nor employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel, and that I am not financially interested in the action.



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Commission Expires July 11, 2026
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Date: August 7, 2024



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